United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7580

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

INTERNATIONAL CONTROLS CORP.,
Plaintiff-Appellee,

vs.

ROBERT L. VESCO, et al.,
Defendants,

and

VESCO & CO., INC.,
Defendant-Appellant.

CIVIL ACTION—ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
SAT BELOW: HON. CHARLES E. STEWART, JR., U.S.D.J.

BRIEF FOR DEFENDANT-APPELLANT, VESCO & CO., INC.

ARUM, FRIEDMAN & KATZ,
450 Park Avenue,
New York, New York 10022

and

HANNOCH, WEISMAN, STERN
& BESSER,
744 Broad Street,
Newark, New Jersey 07102

Attorneys for Defendant-Appellant, Vesco & Co., Inc.

ROBERT C. EPSTEIN
On the Brief

N.J. Appellate Printing Co., Inc., South Plainfield, New Jersey (201) 753-0200

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ISSUES PRESENTED FOR REVIEW

1. Whether relief from the District Court's May 26, 1976 judgment was improperly denied, when that judgment was entered upon the original complaint in this cause, and when filing of an amended complaint, prior to default, rendered the original complaint defunct?

2. Whether relief from the District Court's judgment should be granted, where that judgment is unclear, fails to conform to the pleadings upon which it is purportedly based, and is therefore fatally defective?

3. Whether the District Court's judgment was improperly entered *nunc pro tunc* as of July 12, 1974, when that date is without relevance in this case, and when the *nunc pro tunc* device was improperly employed?

4. Whether the District Court abused its discretion by failing to grant relief from the May 26 judgment to permit a timely appeal therefrom, when equitable considerations dictate such relief, and where the opposing party will not be prejudiced thereby?

CONSOLIDATED STATEMENT OF FACTS AND THE CASE

Vesco & Co., Inc. (hereinafter "the Company") brings this appeal from an order entered November 1, 1976 (207a) by the United States District Court for the Southern District of New York, (Honorable Charles E. Stewart, Jr., presiding), denying the Company's motion to vacate a prior order of the District Court, entered May 26, 1976 (125a).

Appellee, International Controls Corp., (hereinafter "ICC"), instituted this action on June 7, 1973. The complaint (23a) generally alleged that many of the named defendants, although not the Company, did by means of interstate commerce and the national securities exchanges, defraud plaintiff and its stockholders in violation of the Securities Exchange Act of 1935 (15 U.S.C. §78aa). This alleged violation of the securities laws is the sole basis for federal jurisdiction in this case.

Preliminary injunctive relief was secured by ICC, and the Company and other defendants filed motions challenging such relief, jurisdiction, and the sufficiency of the pleadings. See *ICC v. Vesco*, 490 F.2d 1334 (2 Cir. 1974). During the course of those proceedings, it was made clear that ICC would attempt to enforce against the Company any judgment it secured against defendant Robert L. Vesco, and, at all stages, the Company sought to preserve its rights to be heard on the merits of any claims which ultimately would result in an attack on its assets.

On October 5, 1973, a default on the complaint was entered against Robert L. Vesco, individually (hereinafter sometimes referred to as "Vesco"), which was eventually followed by a partial inquest, setting partial damages at $2,422,466.72. However, prior to the entry of default,

plaintiff filed an amended complaint (61a) adding new causes of action (some of them against Vesco) and joining additional defendants. The inquest purported to determine damages based upon the complaint which no longer existed, having been superseded by the amended complaint. An affidavit of service of the amended complaint upon Vesco was filed but no default upon the amended complaint has been entered with respect to him.

On April 8, 1974, ICC filed a complaint against Vesco in another action (74 Civ. 1588). Again, a default was entered against Vesco, and the Company (not a named party therein) sought to intervene to be heard on the issues of liability and damages. The trial court (also Judge Stewart) denied intervention, assuring counsel that the Company would have its opportunity to be heard if ICC sought to satisfy its judgment against Vesco out of assets of the Company. The Company's appeal to the Second Circuit of the denial of the intervention motion was denied, based, at least in part, upon the trial court's assurance that the Company would have its opportunity to be heard.

On May 20, 1975, ICC secured an order to show cause, in effect seeking to enforce both of its default judgments against Vesco by securing assets of the Company. The Company responded by seeking a hearing on the underlying claims against Vesco, both as to liability and damages, and otherwise challenging the appropriateness of executing upon the judgment at that time. The court, apparently reversing its prior stated position that the Company would have the opportunity to be heard on the merits of the judgment sought to be enforced, denied the Company's applications and ordered a hearing *only* on the issues of whether the Company was the *alter ego* of Vesco or whether fraudulent conveyances had been made.

The Company is a Delaware corporation formed on July 12, 1972, as a result of estate planning begun in late

1967 or early 1968, by counsel for the Vesco family along with its accountants. The ultimate creation of the Company was occasioned by tax rulings received on or about April 26, 1972 and July 21, 1972.

In the months of July through December of 1972, therefore, Vesco exchanged 800,000 shares of ICC common stock owned by him (having a value of $2,500,000) to the Company in return for all of the preferred stock of the Company and a portion of the voting common stock. The preferred stock carried with it a liquidating preference equal to the same $2,500,000.

In addition, 46,380 shares of ICC common stock beneficially owned by the Vesco children since 1966, were exchanged for a minority of the voting common stock and all of the nonvoting common stock of the Company.

One of the purposes and effect of the transfer was to put an upper limit on the value of Vesco's ICC holdings, for estate tax purposes, at the par value of the preferred stock (*i.e.*, the appraised fair market value of that stock at the date of the exchanges), thereby permitting all future appreciation of that stock to inure to the benefit of the nonvoting common shareholders—the Vesco children —and to pass to them free of any estate tax.

Assets of the Company consist almost entirely of ICC stock. The Company's stock, in turn, is presently owned as follows: The preferred stock is held by Vesco; 75% of the common stock—the only voting stock—is owned by Patricia J. Vesco as custodian for Anthony, Dawn, and Robert, three of her children under the age of twenty-one. The balance is owned by Daniel Vesco who has passed the age of 21.

The *alter ego* hearing was held on June 20, 1975. By memorandum decision dated August 22, 1975, the District Court held that the Company was the *alter ego* of Robert

L. Vesco and, therefore, that the assets of the Company were available to satisfy the judgments against Vesco as an individual. The court thus never reached the alleged issue as to whether fraudulent conveyances had been effected. Orders were entered which had the effect of securing shares of stock now owned by the Company *without regard* to their prior ownership. Thus, stock benefically owned by non-party third persons since approximately 1966, has been appropriated to satisfy the judgment against Vesco, although no one has even alleged, much less proved, any impropriety by anyone dating back anywhere near said period.

The Company duly filed and perfected an appeal to the Second Circuit from Judge Stewart's *alter ego* ruling. The Company argued on appeal that the court below had inconsistently granted plaintiff substantial rights to proceed as against the Company, while simultaneously denying the Company the right to be heard thereon. In short, in the view of the trial court, this defendant is *not* Vesco for purposes of appealing the lack of procedural and substantive due process, from service through judgment, and has *not* ever been permitted to be heard on the merits; however, it *is* Vesco for purposes of execution and collection.

Defendant's appeal, filed on September 19, 1975, resulted in a decision by the Second Circuit Court of Appeals, dated May 13, 1976, by which the default judgment entered against Vesco, which formed the basis of the proceedings against the Company, was determined to lack the requisite elements of "finality." *International Controls Corp. v. Vesco*, 535 F.2d 742 (2d Cir. 1976). The Court of Appeals, thus, found it unnecessary to pass upon the remaining substantial issues, and remanded the matter to the District Court for clarification and the entry of a "new judgment." Although merely remanding for further proceedings on this underlying issue of the finality of the

default judgment, the Court of Appeals did not expressly retain jurisdiction of the further consequential matters in dispute.

On May 21, 1976, ICC obtained an order to show cause from the District Court as to why a new amended judgment should not be entered *nunc pro tunc* as of July 12, 1974. On the return date of the order to show cause, May 26, 1976, the Company appeared to argue in vain its opposition to the entry of such a *nunc pro tunc* judgment. The court heard only brief argument and gave no substantial reasons for the extraordinary retrospective nature of the judgment entered. Thus, a new "final judgment" was entered against Robert L. Vesco, purportedly effective as of almost two years earlier (125a).

The Company filed an appeal from the May 26 judgment on July 7, 1976, nine days late, again raising substantial issues of due process and procedural defects. By orders dated September 14, 1976 this Court dismissed the Company's appeal as untimely, and declined to reaccept jurisdiction over the issues presented, but left undecided, on the Company's earlier appeal (117a).

The Company then moved the District Court to vacate the May 26 judgment, pursuant to Fed. R. Civ. P. 60(b) (204a), contending, *inter alia*, that equitable considerations required entry of an order from which appeal could be taken and raising other issues not previously considered by the trial court. That motion was consolidated with another by the Company for an extension of time within which to file an appeal, pursuant to Fed. R. App. Pro. 4(a). Both motions were denied by the District Court in an order and opinion dated November 1, 1976 (207a).

The Company herein appeals only from that portion of the District Court's order denying its motion for relief pursuant to Fed. R. Civ. P. 60(b).

ARGUMENT

Point I

Filing of the amended complaint, prior to default, rendered the original complaint without legal effect, so that judgment thereon is a nullity.

The May 26, 1976 judgment (125a) by its terms refers to and enters default judgment on the complaint (23a), and nowhere refers to the amended complaint (61a). Yet it is clear and a mater of docket record in this cause that there was *no* judgment (nor even a request for entry of default) against Robert L. Vesco, prior to the filing of the amended complaint. The sequence of events was as follows:

> 1. The complaint herein was filed on June 7, 1973.
>
> 2. The amended complaint was filed on September 7, 1973.
>
> 3. Plaintiff's request for entry of default on the complaint was dated October 1, 1973, and default (improperly labeled "judgment by default") was entered on the complaint on October 5, 1973.
>
> 4. Judgment upon inquest (which is the subject of the district court's May 26, 1976 *nunc-pro tunc* judgment) was not entered until July 16, 1974.

In short, in this case, plaintiff *requested* entry of default against Robert L. Vesco and proceeded to judgment against him on the complaint long *after* the amended complaint was filed. Put another way, *before* judgment, plaintiff elected, by filing the amended complaint, to "erase" the original complaint from the record.

In the proceedings below, the Company argued that at the point of filing of the amended complaint in this

cause, before default was requested or entered, the original complaint became *functus officio*, so that the District Court's May 26, 1976 judgment, purportedly rendered on the original pleading, was a nullity. Vacation of that judgment, pursuant to Fed. R. Civ. P. 60(b), was requested, substituting therefor, if appropriate, a new judgment on the amended complaint. In support of its position, the Company cited numerous authorities, discussed *infra*, uniformly upholding the proposition that the filing of a complete amended pleading supersedes an original. *No* applicable opposing authority was proffered by plaintiff ICC. Nonetheless, the District Court departed from the settled rule and concluded that, in addition to filing, completed service of an amended pleading is required before an original is superseded. Said the Court:

> "We think that when an *amended* pleading is required to be served on a party, it similarly requires proper service in order to become effective as to this party. Thus, we conclude that if service is not, or cannot be made of the amended pleading, it does not supersede the original. The question to be determined, therefore, is whether Vesco was properly served with the amended complaint." *International Controls Corp. v. Vesco*, 73 Civ. 2518 at 7-8 (S.D.N.Y. Nov. 1, 1976). (Emphasis in original) (207a)

Finding that service of the amended complaint on Vesco was improper, the court held "that the amended complaint did not supersede the original, and that all the judgments properly relate to the original complaint." *Id.* at 9.

It is respectfully submitted that the District Court's view of the law is erroneous and that therefore the Company's motion to vacate the May 26, 1976 judgment was improperly denied.

The Company has found no authority, and the court below relied on none, to support the proposition that a plaintiff who files an amended complaint can proceed on the original pleading.*

Indeed, *all* authority seems to be completely to the contrary, perhaps as most clearly stated in the case of *Phillips v. Murchison*, 194 F. Supp. 620, 622 (S.D.N.Y. 1961), as follows:

> "Upon the *filing* of the amended complaint, which was complete in and of itself and did not refer to or adopt the counts of the prior complaint, that amended complaint superseded the original complaint. The effect of this was to withdraw the prior complaint. which thereupon became *functus officio*. *Bullen v. DeBretteville*, 9th Cir., 1956, 239 F.2d 824, 833; *Nisbet v. Van Tuyl*, 7th Cir., 1955, 224 F.2d 66, 71, 71 C.J.S. p. 716-17." (Emphasis supplied.)

According to 3 Moore's *Federal Practice* §15.08[7], an amended pleading that is complete in itself and makes no reference to nor adopts any portion of the prior pleading, supersedes it. *Accord, Nisbet v. Van Tuye*, 224 F.2d 66 (7th Cir. 1955); 71 C.J.S., *Pleading*, §321 (1951). Thus, it has been held a matter of "hornbook law that an amended complaint, complete in itself" renders a prior complaint "*functus officio*," of no legal effect and no longer functioning. *Lubin v. Chicago Title and Trust Co.*, 260 F.2d 411 (9th Cir. 1956). And as the court observed in *Bullen v. DeBretteville*, 239 F.2d 824, 833 (9th Cir. 1956),

*ICC is apparently proceeding as to some defendants on the original complaint, and others on the subsequent pleading. This paradoxical situation is further exacerbated by the fact that the May, 1976, amended judgment (like its predecessor) is not even completely dispositive of the claims of the original complaint, but reserves and leaves open for further proceedings, issues and causes of action contained in a complaint, which the Company contends was superseded by an amended complaint over three years ago. See *infra* at Point II.

cert. den. 353 U.S. 947 (1957), "[o]nce amended, the original no longer performs any function as a pleading and cannot be utilized to aid a defective amendment." see also: *Washer v. Bullitt County*, 110 U.S. 558 (1884); *Cicchetti v. Lucey*, 514 F.2d 362, 365 (1 Cir. 1975); *LaBatt v. Twomey*, 513 F.2d 641, 651 (7 Cir. 1975); *Loux v. Rhay*, 375 F.2d 55, 57 (9 Cir. 1967); *Fuhrer v. Fuhrer*, 292 F.2d 140, 143-44 (7 Cir. 1961); *Ericson v. Slomer*, 94 F.2d 437, 439 (7 Cir. 1938); Wright & Miller *Federal Practice and Procedure:* Civil §1476, p. 389 (1971).

The only reported case the Company has found in the federal courts dealing with the entry of default upon a complaint, when an amended complaint is also filed, holds that the filing of the amended complaint strips the court of any power to proceed upon the original pleading. *Hutchins v. Priddy*, 103 F. Supp. 601 (W.D. Mo. 1952). The *Hutchins* case was decided upon local Missouri law, which appears indistinguishable in any material way from applicable federal procedure. It is significant that, in the *Hutchins* case, the amended complaint was never properly served on the parties against whom default proceedings were undertaken, based upon the original complaint. The court held, unequivocally, that all proceedings, by default or otherwise, could be prosecuted only upon the amended pleading.

In short, *all* authority, save the opinion below, holds that the filing of an amended pleading *ipso facto* renders an original pleading defunct. Hence, the complaint on which the May 26, 1976 judgment was entered was legally inoperative at the time default judgment thereon was granted and relief therefrom was erroneously denied.

Point II

Relief from the new judgment should be granted since it is unclear, fails to conform to the pleadings upon which it is purportedly based, and is therefore fatally defective.

In its opinion dated May 13, 1976, this Court remanded the Company's prior appeal (75-7548) to the District Court for the "entry of a new judgment to clarify for which, if any, of the claims against Vesco all damages have been computed." *International Controls Corp. v. Vesco*, 535 F.2d 742, 749 (2d Cir. 1976). No such "clarification" ensued.

On May 21, 1976, ICC obtained an order to show cause from the District Court, submitting therewith a "new judgment" supposedly in compliance with those directions. Five days later, after only brief argument, Judge Stewart signed the "new judgment," and entered it *nunc pro tunc* as of July 12, 1974 (125a), giving no substantial reasons for the extraordinary retrospective nature of his action. In the proceedings below upon the Company's motion herein to vacate that "judgment," the Company argued that a comprehensive and detailed comparison of the new judgment with the original and the amended complaints reveals substantial discrepencies. Pointing out numerous specific cross-references between the new judgment and the *amended* complaint, the Company urged that the new judgment apparently refers to the amended, and not the original pleading upon which it purportedly is based.

Moreover, the new judgment fails to "clarify" which claims, or portions of claims, are covered by it. The Company argued that relief therefrom should be granted, if only to record a judgment which will be plain on its face

and consistent with the record and pleadings by clearly indicating specific claims with respect to which final judgment ostensibly is being rendered. Without attempting to reconcile the manifest inconsistencies between the original complaint and the new judgment, and again giving no substantial reasons for its action, the court below summarily concluded that the May 26 judgment referred to the original pleading, and on that basis denied the Company's motion. It is submitted that rather than "clarify" the situation, the new judgment adds further confusion, and is fatally defective. The terminology therein directly pinpointed to "claims" in various counts of the original complaint simply is not comprehensible when one refers to that pleading, but begins to make sense when the claims of the amended complaint are considered. Relief from the May 26 judgment therefore should be granted so that the claims upon which judgment is based may be accurately reflected in the record.

The May 26 judgment (125a) recites that plaintiffs are entitled to recover from Vesco the sum of $2,188,-354.93 plus interest from March 1, 1973, with respect to the claims asserted in the second count of the complaint, and "so much of" the third, fourth, fifth, sixth, seventh, eighth, ninth and eleventh counts thereof as relate to claims arising out of (a) the dividend in kind of the outstanding shares of Fairfield General Corporation declared by International Controls Corp. in late 1970; (b) the purchase by Skyways Leasing Corporation of a Boeing 707 airplane in June of 1971 with funds contributed to Skyways Leasing Corporation by International Controls Corp.; (c) International Controls Corp. and Skyways Leasing Corporation relating to the Boeing 707 airplane and all payments made by International Controls Corp. thereunder; and (d) all monies paid by International Controls

Corp. in connection with defendant Vesco's use of the Boeing 707 airplane.

Presumably, all the counts mentioned should deal with one of the four enumerated claims arising out of the lease and use of the airplane. A comparison, however, of this new judgment and the original complaint (23a) filed in June of 1973, reveals a discrepancy between the causes of action enumerated in the complaint and those set out in the May 26 judgment. For instance, while the second count of the complaint deals exclusively with the airplane, count six is directed against Skyways Leasing Corp., as is count seven. The confusion is compounded by the fact that plaintiff has already settled in full with Skyways Leasing with regard to all of its claims (114a). The eighth count refers to legal fees incurred for the personal use of Vesco, and is thus unrelated to the alleged airplane damages. The ninth count regarding fees, emoluments, and so forth, made to defendants Sears, Clay, and others is not related to the airplane either. Finally, count eleven deals with a dividend in kind, and the role of defendant Marine Midland Bank as the transfer and paying agent. It is also not related to defendant Vesco.

A comparison of the new judgment's provisions with the *amended* complaint herein (61a) indicates that the references in the new judgment may have been taken from the amended complaint. For instance, count eleven of the *amended* complaint deals with reimbursement by I.O.S. to ICC for Vesco's alleged travel expenses, which are apparently the same "monies paid by International Controls Corp. in connection with defendant Vesco's use of the Boeing 707 airplane," referred to in the May 26 judgment. However, any reliance upon or reference to the amended complaint in the new judgment against Vesco is clearly improper. The October 5, 1973, default judgment against

Vesco (97a) was expressly based upon the complaint. The July 12, 1974 judgment on damages issues (116a) expressly referred to the October 5, 1973 default judgment and the *complaint*. Even the new judgment expressly refers to the complaint.

Further, among the specifically enumerated counts of the complaint incorporated by reference in the May 26 judgment against Vesco is count eleven. However, that count only concerns the alleged negligence of Marine Midland Bank. The *ad damnum* clause thereto demands "damages sustained by virtue of the acts of defendants as set forth therein;" and Vesco is not mentioned in that count.

The inclusion in the new judgment of the language "so much of," utilized in reference to all counts but count two, provides further confusion as to what is covered by the new judgment and what is not. The new judgment merely states that jurisdiction is retained to conduct further damage hearings against Vesco on the claims not covered by the new judgment, but fails to state what those claims are. Rather than clarifying the situation as the Second Circuit directed, the new judgment provides further disorder.

Moreover, ICC is apparently proceeding as to some defendants on the original complaint, and others on the subsequent pleading. For instance, on February 19, 1974, a default judgment (111a) was entered against defendant Bahamas Commonwealth Bank (hereinafter "Bahamas"), reduced to a dollar judgment in the amount of $500,000 together with interest, on the basis of the acts alleged in count eleven of the *amended complaint*, the only pleading served on that defendant.

In sum, the May 26 judgment is hopelessly confused, fails even to conform to the pleadings upon which it is

purportedly based, and, as such, is patently deficient. See *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 91 S. Ct. 1076, 28 L.Ed. 339 (1971); *Hutchins v. Priddy*, 103 F. Supp. 601 (W.D. Mo. 1952). Thus, even as amended, the judgment is fatally defective and the District Court's failure to grant relief therefrom was error.

Point III

The May 26 judgment was improperly entered *nunc pro tunc* as of July 12, 1974, and should be vacated and reentered as of July 16, 1974.

Subsequent to the October 5, 1973 entry of default judgment against Vesco on issues of liability (97a), a second judgment on the issue of damages was signed by Judge Stewart on July 12, 1974, and entered on July 16, 1974 (116a). On April 4, 1975 an amended judgment was entered certifying the finality of the October 5, 1973 (liability) and July 16, 1974 (damages) judgments (119a). The April 4 amended judgment was itself amended on September 15, 1975 in order to correct an error in dating the July 16, 1974 judgment, which mistakenly was referred to as of the day it was signed (July 12), rather than the day it was entered (July 16) (121a).

Notwithstanding that prior correction in dating, the District Court's May 26 judgment was entered *nunc pro tunc* as of July 12, 1974, a date without relevance in this case, rather than July 16, 1974, the date of entry of the earlier judgment. The Company argued below that this patent error warrants vacation of the May 26 judgment, substituting therefor a corrective judgment consistent with the District Court's September 15, 1975 order, especially since four days interest on the judgments against Vesco,

totalling nearly 2.5 million dollars, is a significant amount. While perhaps implicitly conceding the correctness of the Company's position, the District Court stated:

> "We think that this ground is not sufficiently substantive to merit our opening the judgment especially in view of the entire context of this motion." *International Controls Corp. v. Vesco*, 73 Civ. 2518 (S.D. N.Y. Nov. 1, 1976) at 10 (207a)

It is respectfully submitted that the error in dating the May 26 judgment is significant and that, indeed, rather than militate against correction of that error, the "context" of the Company's Rule 60(b) motion supplies impetus and support for vacation and reentry of the judgment.

Initially, the Company emphasizes the substantial interest charges accruing on the judgments. Moreover, on September 15, 1975, the District Court, upon application by ICC, permitted entry of a corrective judgment to rectify the identical error here involved. Interests of fairness and consistency require that the Company's Rule 60(b) motion be accorded the same consideration and disposition as the substantially identical motion, based upon identical grounds, brought by ICC.

In reaching its decision, the court below considered the "context" of the Company's Rule 60(b) motion, without expressly defining its parameters. The District Court therefore should have considered the propriety of entry of the May 26 judgment *nunc pro tunc*.* Accordingly, discussion of that issue is warranted and appropriate, as bearing on the "context" in which the Company's Rule 60(b) motion was brought and denied.

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* The Company maintained before the District Court that entry of the May 26 judgment *nunc pro tunc* was clearly erroneous.

Excluding situations in which a litigant dies subsequent to the commencement of an action, but prior to its conclusion, judgment will be entered *nunc pro tunc,* i.e., given retroactive effect back to a date certain, *only* when the judgment was not entered on that date due to the failure of the clerk to properly perform his ministerial function of entering judgment due to error, unwarranted delay, or other reasons unrelated to the legal issues of the case. 6A *Moore's Federal Practice* §58.08 (1974); *Recile v. Ward,* 496 F.2d 675 (5 Cir. 1974), *mod. rehearing den.,* 503 F.2d 1374 (5 Cir. 1974); *Cairns v. Richardson,* 457 F.2d 1145 (10 Cir. 1972); *Mathhies v. Railroad Retirement Board,* 341 F.2d 243 (8 Cir. 1965); *Blankenship v. Royalty Holding Co.,* 202 F.2d 77 (10 Cir. 1953); *Schwartz v. Pattiz,* 41 F.R.D. 456 (E.D. Mo. 1967), *aff'd* 386 F.2d 300 (8 Cir. 1968); *Summons v. Atlantic Coast Line Railroad Co.,* 235 F. Supp. 325 (E.D.S.C. 1964); 21 C.J.S. *Courts* §227 at p. 426.

Absolutely no showing was made or attempted by ICC to the effect that the new judgment was occasioned by clerical error or for non-legal reasons. Indeed, none could be made because the new judgment contains two new substantive provisions: (1) ICC deleted its prior reservation to prove additional damages on some claims, and (2) ICC included a Rule 54(b) certification of no just reason for delay although nothing was presented to the court in connection therewith. All prior judgments were submitted by ICC and the changes made were for legal, substantive reasons making the use of *nunc pro tunc* patently erroneous.

Clearly then, the "context" of the Company's Rule 60 (b) motion justifies, if not compels, relief from the May 26 judgment, substituting therefor a corrective judgment. Substantial interest charges accruing by reason of the four

day differential, inconsistent disposition of substantially identical motions brought on identical grounds by the Company and ICC, and the patently erroneous use of the *nunc pro tunc* procedure are important and consequential grounds for vacation of that judgment. Therefore, the District Court's disregard of these factors, and resulting denial of the Company's motion, was error.

Point IV

The District Court abused its discretion by failing to grant relief from the May 26 judgment to permit the Company to file a timely appeal therefrom.

Rule 60(b)(6) of the Federal Rules of Civil Procedure allows a District Court to relieve a party from a final judgment for "any . . . reason justifying relief from the operation of the judgment." This section "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klappratt v. United States*, 335 U.S. 601, 615 (1949).

On the strength of this rule, the court in *Fidelity & Dep. Co. of Md. v. Usaform Hail Pool, Inc.*, 523 F.2d 744 (5 Cir. 1975) vacated and then reentered a final judgment in order to permit the objecting party to take an appeal therefrom, where the notice of appeal from the original judgment had not been timely filed. Accord, *Expeditions Unlimited v. Smithsonian Institute*, 500 F.2d 808 (D.C. Cir. 1974). Among the relevant circumstances appealing to the court's conscience and thus compelling such action were the following, which are all clearly present in the case *sub judice:*

(1) Lack of prejudice, *Id.* at 750.

(2) Lengthy proceedings of long duration and hotly contested issues, *Id.* at 751.

(3) Substantial monies at stake, *Id.* at 751.

(4) Virtual certainty of appeal, *id.* at 751.

Here, ICC has not attempted and indeed could not make even a colorable showing of prejudice if appeal from the District Court's May 26 judgment is permitted. As demonstrated by correspondence with the office of the Clerk of the Court of Appeals, attached as exhibits to the Littman affidavit (183a), the mere nine-day delay in filing the notice of appeal herein was occasioned by the Company's confusion with regard to procedures, and was mirrored by the confusion of ICC itself. Moreover, that correspondence reveals that all parties were clearly aware that the propriety of the May 26 *nunc pro tunc* judgment would be urged on appeal. ICC has not attempted to show that it was surprised by the Company's appeal, or that it was in any way prejudiced by failure of the Clerk to notify the parties of entry of judgment.

In dramatic contrast, the prejudice to the Company by termination of its rights to an appeal is clearly substantial. From the outset of these proceedings, the Company has unflaggingly argued that it has been denied fundamental due process of law, on grounds that the District Court has granted plaintiff substantial rights to proceed as against the Company on staggering default judgments against Vesco, while simultaneously denying the Company the right to be heard thereon. In short, in the view of the trial court, this defendant is *not* Vesco for purposes of appealing the lack of procedural and substantive due process, from service through judgment, and has *not* ever been permitted to be heard on the merits; however, it *is* Vesco for purposes of execution and collection.

In the original appeal (75-7548), the Company sought review of issues concerning the District Court judgment,

apparently entered upon the amended as opposed to the original complaint, lack of finality of that judgment, and the propriety of the *alter ego* decision. Most importantly, the Company argued in the first appeal that the court improperly ordered cancelation of stock previously owned by the Vesco children, despite the fact that no evidence whatever has been submitted to indicate, or even suggest, that these shares were fraudulently conveyed to the children. Yet the District Court ordered that all of the Company's securities, including the children's shares, be seized to satisfy ICC's judgment against Vesco. Such action is clearly improper, but has never been reviewed by *any* appellate court. *Bangor Punta Operations v. Bangor & Aroostook R. Co.*, 417 U.S. 703 (1974); *Plumbers & Fitters, Local 761 v. Matt J. Zarch Construction Co.*, 418 F.2d 1054, 1058 (9 Cir. 1969); 37 C.J.S. *Fraudulent Conveyances* §307 p. 1138. See also: *Empire Lighting Fixture Co. v. Practical Lighting Fixture Co.*, 20 F.2d 295 (2 Cir. 1927).

It is noteworthy that the linchpin of the opinion below was a finding that service of the amended complaint on Vesco was invalid. Yet, the Company has been foreclosed from challenging the sufficiency of service of the *original* complaint, an issue likewise never determined by *any* court, even though comparison of service of the amended and the original complaints reveals that both pleadings were served in substantially identical manners (55a and 100a). Indeed, the constitutional doubts raised below as to the validity of the extraordinary order authorizing service of the amended complaint certainly would be exacerbated upon examination of the later order (54a and 95a). It is gravely doubtful that either manner of service could pass constitutional muster. See *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Mullane v. Central Ha-*

nover Bank & Trust Co., 339 U.S. 306 (1950); *Milliken v. Meyer*, 311 U.S. 457 (1940).

The remaining factors compelling vacation and reentry of the judgment in *Fidelity & Dep. Co. of Md. v. Usaform Hail Pool, Inc.*, above, are indisputably salient features of the instant action. That these lengthy proceedings, begun in June, 1973, and already before this Court on two prior appeals,* are "of long duration and hotly contested issues," *Id.* at 751, is well appreciated by both the litigants and the courts before which they have appeared. Moreover, that the May 26 judgment, involving nearly $2.5 million, puts "substantial monies at stake," *Id.* at 751, is self-evident.

Hence, under these circumstances, the purposes and spirit of Fed. R. Civ. P. 60(b)(6) to accomplish justice are clearly served by granting relief from the May 26 District Court judgment. The manifest inequity to the Company from denial of its deserved day in court on a myriad of issues of fundamental due process, and the total absence of prejudice to ICC if appeal on those issues is permitted, dictate that such relief be granted. Failure of the District Court to do so was an abuse of discretion, and constitutes reversible error.

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* See *International Controls Corp. v. Vesco*, 490 F.2d 1334 (2 Cir. 1974) and 535 F.2d 742 (2 Cir. 1976).

CONCLUSION

For the reasons expressed herein, it is respectfully submitted that this Court should reverse the decision below denying relief from the May 26, 1976 judgment of the District Court, and that the May 26 judgment be vacated.

Respectfully submitted,

HANNOCH, WEISMAN,
STERN & BESSER
Attorneys for
Defendant-Appellant,
Vesco & Co., Inc.

By: /s/ James J. Shrager
JAMES S. SHRAGER
A Member of the Firm

and
ARUM, FRIEDMAN & KATZ

DATED: January 10, 1977.

ROBERT C. EPSTEIN
On the Brief